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REC'D TN
REGULATORY AUTH.

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OFFICE OF THE
EXECUTIVE SECRETARY

August 6, 1999

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: *Proceeding for the Purpose of Addressing Competitive Effects of
Contract Service Arrangements filed by BellSouth
Telecommunications, Inc. in Tennessee
TRA Docket No. 98-00559*

Dear Mr. Waddell:

Enclosed for filing, please find the original plus thirteen (13) copies of Time Warner Telecom of the Mid-South, L.P. and NewSouth Communications, L.L.C.'s Objections to the Direct Testimony of Randall L. Frame and Motion to Strike. Copies are being served on parties of record.

If you have any questions or concerns with regard to this filing, please do not hesitate to contact me.

Very truly yours,

**FARRIS, MATHEWS, BRANAN
& HELLEN, P.L.C.**

Charles B. Welch, Jr. / *CBW*
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CBWjr:kms

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Parties of record
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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

REC'D TN
REGULATORY AUTH.

**PROCEEDING FOR THE PURPOSE OF ADDRESSING
COMPETITIVE EFFECTS OF CONTRACT SERVICE
ARRANGEMENTS FILED BY BELL SOUTH
TELECOMMUNICATIONS, INC. IN TENNESSEE**

'99 AUG 6 PM 4 15
DOCKET NO.
98-00559 OFFICE OF THE
EXECUTIVE SECRETARY

***TIME WARNER TELECOM OF THE MID-SOUTH, L.P. AND NEWSOUTH
COMMUNICATIONS, L.L.C.'S OBJECTIONS TO THE DIRECT TESTIMONY OF
RANDALL L. FRAME AND MOTION TO STRIKE***

Comes now, Time Warner Telecom of the Mid-South, L.P. ("Time Warner") and New South Communications, L.L.C. ("NewSouth") and respectfully submit the following objections to the Direct Testimony of Randall L. Frame filed on behalf of BellSouth Telecommunication, Inc. ("BellSouth). Time Warner and NewSouth moves that the objectionable portions of the testimony be stricken as it is violative of T.C.A. § 4-5-313.

SPECIFIC OBJECTIONS

OBJECTION NO. 1:

BellSouth asks its witness: "is the pricing offered through BellSouth's CSAs anti-competitive?" (Direct Testimony of Randall L. Frame, P. 12, line 20.) A: "No. BellSouth offers Contract Service Arrangements in response to the competitive alternatives available to its customers. These competitive offers are often priced substantially below the rates filed in BellSouth's tariffs, as is the case with the two CSAs at issue. However, BellSouth ensures that the discounts offered under those

contracts do not result in the discounting of services below cost. The information establishing that the two CSAs do not result in BellSouth selling services below cost is propriety and is being submitted under cover as Exhibit RLF-1 to my testimony.”

NewSouth and Time Warner object to this question on grounds that it requires a legal conclusion. Frame’s experience is telecommunications sales and marketing, and may be considered an expert witness under the Tennessee Rules of Evidence. See, Tenn. R. Evid. 702 and 703. As an expert, Frame may give his opinion on a subject within the area of his expertise. A witness such as Mr. Frame cannot, however, be permitted to draw conclusions of law when testifying. See, Tenn. R. Evid. 701 and 702.

In this docket, the TRA is examining whether BellSouth business practices are “anti-competitive.” This term is a legal term, and is defined as: “cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.” Tennessee Code Ann. § 65-5-208(c). It is impermissible for Frame to state that BellSouth’s CSA’s are not anti-competitive because it is the Authority’s role to make that determination. It is the Authority’s role to consider the facts properly admitted into the record and decide as a matter of law whether BellSouth’s CSAs are anti-competitive as defined by T.C.A. 65-5-208(c). Thus, Frame may describe BellSouth’s behavior and give his opinion about its motivation for so acting; however, it is impermissible for him to state the legal conclusion that BellSouth CSA’s are not “anti-competitive.”

OBJECTION NO. 2:

BellSouth asks its witness: “are these CSAs discriminatory?” (Direct

Testimony of Randall L. Frame, P. 13, line 13.) A: “No. BellSouth has repeatedly stated that it will offer these CSAs or any other CSA to any similarly situated customer.”

NewSouth and Time Warner object to this question based upon the same grounds as stated in Objection No. 1. Frame’s statement that BellSouth’s CSAs are nondiscriminatory is inadmissible because a witness’s opinion cannot take the form of a legal conclusion.

Tennessee Code Annotated § 65-21-106 prohibits discrimination in telephone connections, and the statute states that:

“no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company engaged in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise”

Id.

Thus, when Frame states that BellSouth CSAs are non-discriminatory, he makes the legal conclusion that BellSouth’s actions have not violated this statute. Only the Authority can come to such legal conclusions, and thus, Mr. Frame’s testimony is inadmissible.

OBJECTION NO. 3:

BellSouth asks its witness: “why is the discount BellSouth offers in its CSAs not discriminatory?” (Direct Testimony of Randall L. Frame, P. 14, line 12). A: “Although I am not a lawyer, the discount on billed revenue is determined by the specific service mix for each customer as described above. Because these

customers have a different product mix, they are not similarly situated such that BellSouth can lawfully offer the customer different discounts and revenue commitments.”

NewSouth and Time Warner object to Frame’s answer because he fails to give factual support for his opinion. Although Frame is an expert witness, his testimony must be based upon conceded or proven facts. See, Johnson v. Attkisson, 722 S.W.2d 390 (Tenn. Ct. App. 1986) (holding that for an expert to give an opinion on direct examination based on his own knowledge, he must, as a general rule, first testify to those facts upon which his opinion is based).

More specifically, Frame’s assertion that the customers are not similarly situated because they have different product mixes requires two assumptions of fact: 1) that each customer has, in fact, a different product mix, and 2) that variations in product mixes causes customers to be dissimilarly situated. Frame fails to cite to evidence or facts that establish that the product mixes are different, and, moreover, he fails to establish how a variance in products causes seemingly similar situated customers to be different. Thus, this testimony should not be admitted.

OBJECTION NO. 4:

BellSouth asks its witness: “are the termination provisions of BellSouth’s contract service arrangements anti-competitive?” (Direct Testimony of Randall L. Frame, P. 14, line 19.) A: “No. The termination provisions of the two CSAs at issue were individually negotiated to meet the business needs of both customers as well as BellSouth. They are reasonable and do not constitute a “penalty” should the

customer decide to terminate the CSA early.”

NewSouth and Time Warner object to this question because the witness makes the legal conclusion that the termination provisions of BellSouth's CSAs are not anti-competitive, and object according to the same grounds as stated in Objection No. 1.

OBJECTION NO. 5:

BellSouth asks its witness: “how do the termination provisions of BellSouth’s contract service arrangement compare to those of BellSouth’s competitors?” (Direct Testimony of Randall L. Frame, P. 15, line 2) A: “BellSouth cannot fully compare the early termination provision of its CSAs with those contained in the special contracts of its competitors because not all the parties have made their contracts available for inspection. However, based on the limited information available, BellSouth believes that the termination provisions of the two CSAs at issue are similar to if not more lenient than comparable provisions offered by BellSouth’s competitors.

AT&T/TCG CSAs produced in response to discovery incorporate termination liability provisions from AT&T/TCG tariffs. For example, AT&T/TCG’s tariff for its PrimePlus Service includes the following termination liability provisions (TN R.A. No. 1, Section 4.4.B):

Customers who discontinue service prior to the end of their term commitment will be assessed an early termination charge equal to their average monthly usage charges times the number of months remaining on their term commitment.

AT&T/TCG’s tariff for its PrimeXpress network service includes the following

tariff termination liability (TN R.A. N. 1, Section 4.7.3):

Upon the Customer's discontinuance of PrimeXpress facilities prior to the expiration of the agreed-upon term, the termination liability with regard to facilities will be equal to the monthly charge times the number of months remaining on the contract - discounted for present value of 6%.

WorldCom's Tennessee Tariff No. 2, Section 2.7 includes a provision stating that the Customer's termination liability shall be equal to

all unpaid nonrecurring charges expended by Company to establish service plus any disconnection, early cancellation or termination charges reasonably incurred and paid to third parties by Company on behalf of Customer, plus all recurring charges specified in the applicable service order for the balance of the then-current term discounted at a rate determined by the Tennessee Regulatory Authority minus a reasonable allowance for costs avoided by the Company as a direct result of Customer's cancellation.

MCI's TRA Tariff No. 2, Page No. 71.1.3, Section 3.1.6.2, provides for termination charges equal to the customer's highest billed monthly charges incurred during the length of the term commitment multiplied by the number of months remaining in the customer's Term Plan.

Time Warner's Tennessee Tariff No. 2, Section 2.13.2 provides that if a Customer terminates services before the completion of the term for any reason other than a service interruption, the customer agrees to pay all recurring charges specified in the applicable service order tariff for the balance of the then-current term.

NEXTLINK's Tariff Local Exchange Service TRA No. 1, Section 2.7.2 similarly provides that if a customer cancels services before the completion of the term, the

customer agrees to pay all recurring charges specified in the applicable service order tariff for the balance of the then-current term.”

NewSouth and Time Warner object to this response because it violates Rule 1002 of the Tennessee Rules of Evidence. Rule 1002 states that “to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature.” In his testimony, Frame reads termination liability provisions extracted from these tariffs of BellSouth’s competitors. His testimony is inadmissible because the best evidence of the substance of these writings is not his reading of these documents, but rather, the documents themselves. If BellSouth wants to discuss the contents and substance of these tariffs, these documents must first be properly identified and admitted into evidence.

OBJECTION NO. 6:

BellSouth asks its witness: “why did the customer in CSA TN 98-2766-00 decline the newer termination language?” (Direct Testimony of Randall L. Frame, P. 17, line 18.) A: “While it is difficult for BellSouth to speculate about why the customer declined to accept the newer termination language, it appears that the termination charges specified in the original negotiated language would not exceed the termination charges calculated under the proposed language. In fact, over the range of discounts specified in this CSA, the termination charges under the original negotiated language could be less than those under the newer language.”

NewSouth and Time Warner object to this question because it requires the witness

based solely on speculation and conjecture. BellSouth has failed to lay a foundation establishing that Frame has personal knowledge of or experience with either the particular CSA or the customer in question. To the contrary, the witness acknowledges that “it is difficult for BellSouth to speculate about why the customer declined to accept the newer termination language.” Rule 602 of the Tennessee Rules of Evidence states that “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Tenn. Rules of Evid. 602. Although Rule 602 is subject to the provisions of Rule 703 relating to opinion testimony by an expert, 703 does not apply to this question because Frame’s expertise is inapplicable to his determination of a particular customer’s state of mind in making decisions about specific contract provisions. If BellSouth wants to admit direct testimony about this issue it must present testimony of a witness with personal knowledge of the facts offered.

OBJECTION NO. 7:

BellSouth asks its witness: “why did the customer want this [rate assurance] provision in the CSA?” (Direct Testimony of Randall L. Frame, P. 19, line 19.) A: “The customer apparently felt that that [sic] it may receive additional proposals from competitors in the future, and it wants the flexibility to take advantage of those proposals either by receiving lower rates from BellSouth, or moving service from BellSouth to the lower-priced competitor.”

NewSouth and Time Warner object to this question because it requires the witness to speculate about another entity’s motivation for wanting a certain contract provision, and object according the same grounds as given in Objection No. 6.

OBJECTION NO. 8:

BellSouth asks its witness: “why did BellSouth agree to this provision in this specific Contract Service Arrangement?” (Direct Testimony of Randall L. Frame, P. 20, line 1.) A: “BellSouth agreed to this provision as part of the negotiation with he customer. BellSouth had to accept this language in order to secure an agreement with the customer. The only other alternative was to lose this customer’s business. Again, this provision demonstrates that CSAs are very much the product of negotiations between BellSouth and the customer and that BellSouth cannot simply dictate contract terms to its customers.”

NewSouth and Time Warner object to this question because an insufficient foundation has been laid. More specifically, it is not apparent that Frame is competent to answer this question. Frame stated earlier in his testimony that he is employed by BellSouth Business Systems (Direct Testimony of Randall L. Frame P. 1, line 7), but this entity’s relationship to BellSouth Telecom is not readily apparent. Until a foundation establishes that Frame has personal knowledge about BellSouth Telecom’s contract negotiation surrounding this particular CSA, NewSouth and Time Warner maintain that Frame is not competent to offer this testimony.

OBJECTION NO. 9:

BellSouth asks its witness: “do BellSouth Contract Service Arrangements preclude BellSouth’s customers from obtaining products or services from other telecommunications providers?” (Direct Testimony of Randall L. Frame, P. 20, line 13.) A: “No. These two CSA customers may choose any other competitive service

providers in addition to BellSouth. They may purchase telecommunications services from BellSouth or its competitors in any combination that meets their business needs."

NewSouth and Time Warner object to this question because he fails to provide factual support for his opinion, and object according to the same grounds as stated in Objection No. 3.

Respectfully submitted,

**FARRIS, MATHEWS,
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CERTIFICATE OF SERVICE

I, Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing Objections to the Direct Testimony of Randall L. Frame of Time Warner Telecom of the Mid-South, L.P. And NewSouth Communications, L.L.P. on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid, this the 6th day of August, 1999.

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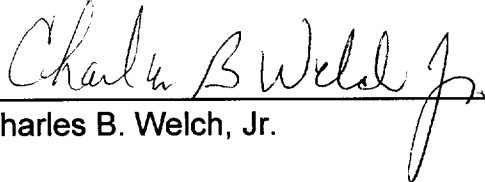
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